BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL PAUL WIEHE Claimant	)	
VS.	)	
KISSICK CONSTRUCTION Respondent	)	Docket No. 1,026,227
AND	)	
BUILDERS ASSOC. SELF-INS. FUND Insurance Carrier	)	

ORDER

Both parties request review of the April 27, 2006 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The claimant was injured in an accident at work on September 21, 2005 when the machine he was driving tipped over and ejected him from the cab. This matter originally went to preliminary hearing before the Administrative Law Judge (ALJ) on January 4, 2006. After that hearing the ALJ determined claimant was impaired by drugs at the time of the accident and denied claimant benefits. The preliminary hearing decision was appealed to the Board, which reversed, finding respondent failed to meet its burden of proof that claimant's drug impairment contributed to the accident.

The matter went to preliminary hearing a second time on April 26, 2006, before the ALJ. Additional evidence was presented by respondent consisting of testimony from an experienced heavy equipment operator and an addiction counselor to establish that claimant's drug impairment contributed to the accident. And the heavy equipment operator opined that if claimant had been wearing his seat belt it would have been less likely that he would have been injured in the tip over accident.

The ALJ in his April 27, 2006 Order determined that respondent had failed to meet its burden of proof to establish that claimant's drug impairment contributed to the accident.

However, the ALJ further determined that the claimant's injuries resulted from his failure to use the seatbelt and denied claimant compensation benefits.

The claimant requests review of whether compensation should be denied due to claimant's failure to wear a seat belt and whether the drugs contributed to claimant's work-related accident on September 21, 2005. Claimant argues the accident is compensable under the Kansas Workers Compensation Act.

The respondent requests review and argues it met its burden of proof to establish that claimant's drug impairment contributed to the accident. And respondent further argues that claimant's failure to wear a seat belt while operating his machine was a willfull failure to use a guard or protection provided by respondent. Accordingly, respondent requests the Board to affirm the ALJ's denial of benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The ALJ provided the following analysis of the new evidence:

> The respondent produced testimony from Charles Foshee, an addiction counselor, who said that the circumstances surrounding the accident showed that drug impairment played a part in the accident. Foshee testified generally that marijuana can slow reaction time and make a person less aware of what is going on around them. However, Foshee did not know what the claimant's level of drug concentration (62 mg/nl) meant in terms of physical effects, or what particular drug effect contributed to the accident. Foshee did speak about the claimant being highly impaired, but he based this opinion on the fact that the claimant's concentration was four times the statutory 15 mg/nl threshold for impairment. Foshee did not have the knowledge or expertise to comment on how the claimant was impaired at the time of the accident.
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> The respondent also produced testimony from Robert Matter, an experienced heavy equipment operator working for the Operating Engineers Local 101 Union. Matter testified that there was nothing to account for the claimant tipping the sheep's foot other than the claimant's impaired operation of the vehicle. Both Matter and Foshee pointed out that the claimant tried once unsuccessfully to back the vehicle over the dirt pile, then did it again, at which point the accident occurred. They felt the fact that the claimant tried the maneuver a second time demonstrated his impaired judgment. Neither witness could directly connect the claimant's decision to the existence of 62 mg/nl of THC in the claimant's body.
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> This case is the same factual posture as it was following the January 6 hearing. The only apparent cause of the accident was the way the machine was operated.

> The machine operator was impaired by drugs. This is not enough to prove that the operator's impairment contributed to the accident. The respondent must have something more to show how the impairment contributed to the accident. The evidence produced by the respondent fails to show how the claimant's impairment contributed to the sheep's foot rolling over. The record did not demonstrate what physical or mental effects of THC played a factor in the occurrence of this accident.[1]

The Board agrees and affirms the ALJ's determination that respondent failed to meet its burden of proof that claimant's impairment contributed to the accident.

It is undisputed that claimant was not wearing a seat belt when the machine he was operating tipped over. The ALJ determined that the seat belt was a guard or protection provided by respondent and that claimant's injuries resulted from his failure to use the seat belt.

K.S.A. 2005 Supp. 44-501(d)(1) provides:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The burden placed upon an employer by the Kansas Supreme Court with respect to this defense is substantial. As used in this context, the Kansas Supreme Court in *Bersch*[2] and the Court of Appeals in a much more recent decision in *Carter*[3] have defined "willful" to necessarily include:

> . . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.' *Carter* at 85.

The mere voluntary and intentional omission of a worker to use a guard or protection is not necessarily to be regarded as willful.[4]

In this instance there is simply the admission that claimant was not wearing his seat belt when the accident occurred. Claimant's actions may well have been careless and

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[1] ALJ Order (Apr. 27, 2006) at 2.

[2] *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 (1920).

[3] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[4] *Thorn v. Zinc, Co.*, 106 Kan. 73, 186 Pac. 972 (1920).

negligent but the evidence does not rise to the level that his actions were intentional and deliberate.

Moreover, the foregoing statute is supplemented by K.A.R. 51-20-1 which provides:

> **Failure of employee to use safety guards provided by employer.** The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

The administrative regulation promulgated to implement the requirements K.S.A. 2005 Supp. 44-501(d) mandates that when safety rules are generally disregarded by employees and not rigidly enforced by the employer, then violation of the rules will not prejudice an injured employee's right to compensation. There was simply no testimony provided regarding respondent's policy, if any, regarding seat belt usage. There is no testimony that respondent required the seat belt be worn or that there were repercussions for failure to use a seat belt while operating the equipment.

Finally, Mr. Matter agreed that even if claimant had been wearing the seatbelt he still could have suffered a head injury in the tip over accident because of the size of the machine claimant was operating.

The Board concludes that, under the facts of this case and based upon the evidence compiled to date, the failure to use a seat belt cannot be utilized as a defense to the claim. The ALJ's Order denying benefits is reversed.

WHEREFORE, it is the finding of the Board that the April 27, 2006 Order of Administrative Law Judge Kenneth J. Hursh is reversed.

IT IS SO ORDERED.

Dated this _____ day of July 2006.

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BOARD MEMBER

c: Christopher J. McCurdy, Attorney for Claimant
C. Anderson Russell, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director